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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-824

HAROLD BRAUER,

Petitioner,

vs.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, HAROLD BRAUER, respectfully prays that a Writ of Certiorari issue to review the decision and opinion of the Court of Appeal of the State of California, Second Appellate District, entered on June 27, 1978.

Opinion Below.

The opinion of the Court of Appeal of the State of California, Second Appellate District, was certified for publication and is cited as 2nd Civil No. 52726; Superior Court No. C 92128.

Jurisdiction.

Petitioner petitioned for a rehearing in the Court of Appeal which was denied on July 19, 1978 and his Petition for Hearing in the Supreme Court was de-

nied on August 24, 1978. Jurisdiction is invoked under 28 U.S.C. §1254(1). Jurisdiction is further invoked by the fact that there is a conflict between a decision of the United States Court of Appeals for the Seventh Circuit and the Court of Appeal of the State of California, Second Appellate District, regarding the interpretation of 29 U.S.C. Section 186.

Petitioner dismisses Local 108 of Sheet Metal Workers International Association, C. Ringwood; R. Pic'l; R. Mosula from this petition.

Question Presented.

Whether the Labor Management Relations Act of 1947, 29 U.S.C. Section 186, precludes a Fifty Percent (50%) shareholder of a small, closely held corporation from participating in a pension established under this section.

Statement of the Case.

From 1948 until July of 1973, Petitioner was a dues-paying member in good standing of Local 108 of the Sheet Metal Workers International Association (hereinafter referred to as "LOCAL 108"). From 1951 to 1957, Petitioner was a partner in the business firm of Crenshaw Sheet Metal and Heating Company with one other individual, Irv Rudley. In 1957, Petitioner and his partner formed a corporation titled Crenshaw Sheet Metal & Heating, Inc. (hereinafter referred to as "CRENSHAW"). In 1965, Petitioner acquired Fifty Percent (50%) of Crenshaw and became Vice-President. (App. D., p. 2.) In 1958, a pension plan was

created and pursuant to the collective bargaining agreement, Crenshaw became a participant. (App. D., p. 2.) From 1957 to 1973, Petitioner remained a dues-paying member of Local 108. In 1973, Petitioner received a letter advising him that he had 25 years of vested pension credits which would entitle Petitioner to $500.00/per month, for the rest of his life. (App. D., p. 3.)

Subsequently, Petitioner was notified by Sheet Metal Workers Pension Plan of Southern California (hereinafter referred to as "PENSION PLAN"), that he could not participate in the pension plan because he was a co-owner of Crenshaw.

Additionally, Local 108 requires that as a condition of continued employment, all "employees . . . within eight (8) days following the beginning of such employment, become a member of Local 108". Thus, by virtue of the Local 108 Constitution, Petitioner was required to be a Union member, and was so for 25 years.

Lastly, the term "employee", as defined in the pension plan, provides for inclusion of said employees if not in violation of existing law or regulation.

The Court of Appeal denied Petitioner his pension on the sole ground that he was an employer because he owned Fifty Percent (50%) of Crenshaw, a small, closely held corporation.

REASONS FOR GRANTING THE WRIT.

THE COURT OF APPEAL'S HOLDING THAT PETITIONER WAS AN EMPLOYER FOR PURPOSES OF SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 29 U.S.C. §186(c)(5) IS ERRONEOUS AND CONTRARY TO PRINCIPLES ENUNCIATED IN THE DECISIONS OF THIS COURT AS WELL AS RECENT APPELLATE RULINGS DECIDED AFTER PETITIONER'S CASE WAS HEARD. THE ISSUE OF WHETHER OR NOT A FIFTY PERCENT (50%) SHAREHOLDER OF A SMALL, CLOSELY HELD CORPORATION IS AN EMPLOYER OR EMPLOYEE IS OF SUBSTANTIAL IMPORTANCE BECAUSE THERE ARE MANY TAFT-HARTLEY PLANS, QUITE A NUMBER OF WHICH ALLOW PARTICIPATION BY PERSONS SUCH AS PETITIONER.

I

The Holding by the California Court of Appeal Is in Conflict With the Recent Decisions of the Other Appellate Courts.

Prior to the Court of Appeal's ruling, there has been no Court, State, Federal or otherwise, that has held that a Fifty Percent (50%) shareholder of a corporation cannot participate in a Taft-Hartley Trust Fund.

29 U.S.C. Section 152(3) defining the term employee was erroneously applied by the Court of Appeal to 29 U.S.C. Section 186(c)(5). All the N.L.R.B. cases cited by the parties and the Court below relate to the use of the term "employee" as it is used in Subchapter II, Chapter 7, Title 29 (29 U.S.C. §§151-168). These sections relate to the collective bargaining process, not to the administration of trust funds. In particular, the Court of Appeal relied in their opinion

on the case of *Cerni Motor Sales, Inc.* (1973) 201 N.L.R.B. 918, which concerned the issue of who would be an employee for purposes of collective bargaining purposes.

On August 11, 1978, the United States Court of Appeals, for the Seventh Circuit, rendered a decision in the case of *James J. Reiherzer v. Daniel J. Shannon, and Central States, Southeast and Southwest Areas Pension Fund,* No. 77-1911 which encompasses the identical issues, and this holding is completely opposite to the California Court of Appeal's decision involving Petitioner.

In the *Reiherzer* case, the Court found that *Reiherzer,* who was a Ninety Percent (90%) shareholder in a corporation, could participate in a Taft-Hartley Trust Fund. The Court held that Defendant's contention that they would be in violation of the L.M.R.A. Section 302(c)(5) because of the definition of the term "employee" found in the act which states:

> "The term employee shall include any employee . . . but shall not include any individual employee as a supervisor."

was completely without merit. Thus, this decision is completely opposite to the ruling by Second Appellate District of the Court of Appeal in the State of California and, therefore, certiorari should be granted to resolve this conflict.

Furthermore, the Court, in *Reiherzer,* found that Revenue Ruling 69-421(j)(3) permits shareholders who are bona fide employees of a corporation to participate in the corporation's plan to the same extent as other employees. The Court further states that Revenue Ruling 69-421(j)(1) may exclude sole proprietors and partners from participating in a qualified plan and

does not exclude corporate officers who may be employees of a valid corporation from participating in a qualified plan. Since the trust fund was established after Petitioner was an owner of Fifty Percent (50%) of the corporate stock and an officer of the corporation, then Revenue Ruling 69-421(j)(2) does not preclude Petitioner from participating in the trust fund.

In the recent case of *Sanchez v. Trustees of Pension Plan*, 359 So.2d 1279, decided June 19, 1978 in the Louisiana Supreme Court, the Court held that two individuals, who had paid Union dues for many years and all other sums required of Union members and who contributed to Union pension, health and welfare plans pursuant to prevailing collective bargaining contracts, are employees within the meaning of their plans, even though the Court found that these two individuals were top officers, in covered corporations in which each holds at least Fifty Percent (50%) of the stock. The Court noted that officers and supervisory employees are not excluded by Section 302 of the L.M.R.A. from participation in contractually-established employee benefit trust funds. The Court noted that the right of participation depends upon the specific language of the trust instruments themselves. In *Sanchez*, the Court cited the trust language which says that trust funds provide that benefits may be received by "any employee of a contributing employer covered by a collective bargaining contract and by such other employees whom the trustees shall determine to be employees."

In the present case, the trust fund says that covered employment under the plan means "any employee of an individual employer who performs one or more hours of work covered by any of the collective bargaining agreements." Thus, this provision is almost

identical to the provision in the *Sanchez* case and thus, because of the similarity between the two, and the opposite opinions reached by two different Courts, it is this Petitioner's contention that because of the conflicts among the Courts, that this Court grant a writ of certiorari to establish uniformity in the decisions of the Courts across the nation.

II

The California Court of Appeal Failed to Consider the Purpose of Section 302(c)(5) Which Calls for the Inclusion of Petitioner in These Pension Plans.

The Court of Appeal erred in failing to consider the purpose for which Section 302(c)(5) of the Labor Management Relations Act was enacted. A review of the purpose of this Section was important because of the trustees' reliance on the language of the trust agreement which provides for inclusion as long as not in violation of any existing law or regulation. The legislative history of the statute simply states:

> "The purpose of these amendments to Section 302 is to forbid any payment, loan or bribe by any employer, employer association, or anyone acting on an employer's behalf . . ." 2 U.S. Code Cong. and Admin. News 2469 (86th Cong. 1959).

Justice Blackman explained the Court's general approach to interpreting Section 302(c)(5):

> "We would approach our present task with a construction policy, *favoring inclusion and benefits where there is no positive statutory language or inference of exclusion*, rather than one favoring exclusion and a denial of benefits where there

is no positive language of inclusion." (Emphasis added). *Blassie v. Kroger Company,* 345 F.2d 58, 68 (8th Cir. 1965).

Thus, the Courts have favored inclusion where there is no statutory language or inference of exclusion.

III

The California Court of Appeal's Reliance on Cerni vs. Ford Motor Company Is Totally Erroneous.

Additionally, the Court of Appeal failed to look at the specific language in the Petitioner's pension plan and relied solely on case law that decided who was an employee for purpose of collective bargaining, only. In particular, the Court of Appeals erroneously relied on *Cerni Motor Sales, Inc. v. Ford Motors* (1973) 201 N.L.R.B. 918. The Court of Appeal stated that "where an individual owns 50% or more of a closely held corporation, as in the case of a co-partner, that individual is, for purpose of Section 152(3), the actual employer of the employees." (App. D., p. 9.)

The reliance on this case is totally erroneous because this was decided in a collective bargaining context, *i.e.,* who would be an employee for collective bargaining purposes only, not who would be eligible for pension established under 302(c)(5) of the Labor Management Relations Act, 1947, 29 U.S.C. 186.

Furthermore, in the case of *N.L.R.B. v. Caravelle W.D. Prod., Inc.,* 466 So.2d 675 (7th Circuit, 1972), the Court held that:

> "The N.L.R.B. had acted arbitrarily in excluding a relative of a controlling shareholder/officer of a corporation from being considered an employee of the corporation pursuant to the Labor Management Relations Act Section 2(3), 29 U.S.C. Section 152(3) which provides 'the term "employee" shall include any employee . . . but shall not include . . . any individual employed by his parent or spouse.' "

Thus, the relative had to be considered an "employee" of the corporation unless the business was, in fact, a sole proprietorship. The Court was stating that the shareholder/officer was not the employer of his or her relative.

Thus, the Petitioner herein could not be considered an employer because he was a shareholder and/or officer of a small, closely held corporation. Of utmost importance is the fact that *Caravelle* was decided prior to *Cerni* and the *Cerni* case failed to distinguish the *Caravelle* case. Thus, the 7th Circuit has rejected the rationale for *Cerni* in the *Caravelle* case cited above.

In the case of *Allied Chemical and Alkali Workers of America v. Pittsburg Plate Glass Co.,* 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383, the Court held that

> "contrary to the Board's assertion, the Union's role in administration of the funds is of a far different order from its duties as collective-bargaining agent. To accept the Board's reasoning that the Union's §302 (c)(5) responsibilities dictate the scope of the §8(a)(5) collective bargaining obligation would be to allow the tail to wag the dog."

What the Court was saying is that there are completely different standards in determining who can participate in a collective bargaining agreement as compared to who can participate in a pension plan established thereunder.

IV

The Trustees' Decision Was Arbitrary and Capricious Because Their Decision Was Based on an Erroneous Interpretation of Case Law.

The Court of Appeal's decision can also be reversed on the grounds that the trustees' decision was arbitrary and capricious.

Where the trustees' decision is erroneous on a question of law, it should be reversed. In the present case, it was stipulated that Petitioner was a Fifty Percent (50%) owner of a small, closely held corporation, and thus, where the facts are stipulated, it becomes a question of law. (1 Witkin, Summary of California Law, "Agency and Employment" Sec. 22, page 658.) In *Rehmar v. Smith* (C.A. 9th, 1976) 55 F.2d 1362, the Court held at page 1371:

> "Those decisions may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or *erroneous on a question of law*." (Emphasis added.)

To the extent that the trustees "interpret" the provision by adding an unwritten proviso that Fifty Percent (50%) or greater shareholders are not employees, is itself a violation of 186(c)(5). This Section also requires that the requirements be "in writing" and the proviso regarding stockholders certainly is not in writing. *Cuff v. Gleason* (E.D. N.Y. 1974) 382 F. Supp. 1144, 1146, Rev'd on other grounds, 515 F.2d 128.

V

Public Policy Dictates That Petitioner Be Granted His Pension Pursuant to Section 302(c)(5) of the Labor Management Relations Act.

Public policy dictates that Petitioner be granted his pension pursuant to Section 302(c)(5) of the Labor Management Relations Act.

First, the Petitioner was a corporate officer in a small, closely held corporation and, thus, is much closer to an employee than would be a corporate officer in a rather large corporation such as Ford Motor Company. Big corporations do not want to be in the plans established for the benefit of Petitioner because they can make more money under their own internal pension plans than would be available for them under the pension plans created pursuant to collective bargaining agreements by a Union.

Secondly, if we do not allow people such as Petitioner to participate in these Taft-Hartley pension funds, these individuals will lose their right to accumulate pension credits because their pension credits will not be transferable from one company to another because of their ownership of a percentage of corporate stock. In other words, this would prohibit people such as Petitioner from leaving a particular company and taking their pension rights with them. Thus, a great detriment will occur to people such as Petitioner by the inability to accumulate pension credit and transferability thereof from job to job.

Thirdly, by not allowing Petitioner to become a participant in a Taft-Hartley pension fund, creates a problem of diversification of assets established in a pension for Petitioner. If Petitioner were part of a larger trust fund, then the assets could be diversified among varying assets, securing the amount contributed to the pension by the greater ability of diversification.

Fourthly and lastly, many plans across the nation allow workers such as Petitioner to participate in these pension plans set up under the Taft-Hartley Act. It is extremely important that this Court grant the Writ of Certiorari because the plans which allow for the participation of people such as Petitioner are now placed in a very unstable position.

Conclusion.

The Petition for a Writ of Certiorari should be granted.

Dated: November 15, 1978.

Respectfully submitted,

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MARC J. BRAUER,
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APPENDIX.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Harold Brauer, Plaintiff and Appellant, vs. Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada; Local 108 of Sheet Metal Workers International Association; C. Ringwood, Defendants and Respondents. 2d Civ. No. 52726, (Sup. Ct. No. C-92128).

Filed: June 27, 1978.

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven S. Weisman, Judge. Affirmed.

Marc Jay Brauer, Michaels and Sobel, for Plaintiff and Appellant.

Robert W. Gilbert; Pesses, Golden and Chapman, By: William S. H. Chapman; for Defendants and Respondents.

At the time of this appeal, appellant was and had been since 1948 a member of Sheet Metal Workers International Association, Local 108 (Local 108), one of the respondents herein. In 1951, appellant became a partner in the business firm of Crenshaw Sheet Metal and Heating Company (Crenshaw). In 1958, the Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada (the Pension Plan), also a respondent, came into existence. The Pension Plan concededly is one governed by the provisions of the Labor Management Relations Act of 1947 as amended (the Act)[1] in section 302 thereof (29 U.S.C. § 186).

[1]U.S.C. § 151 et seq. All code section references hereinafter are to the United States Code, Title 29.

At about the same time, Crenshaw was incorporated as Crenshaw Sheet Metal and Heating, Inc. (Crenshaw Inc.) though appellant did not then become a shareholder of the company. In 1965, appellant acquired as registered owner 50 percent of the outstanding stock of Crenshaw Inc. and presently continues to own one-half of that business. Throughout his involvement with Crenshaw and Crenshaw, Inc., appellant contributed to success of the business by his efforts in the field as a sheet metal worker and occupied the managerial position of Vice President of Crenshaw Inc. for the most part in name only. From its inception, Crenshaw Inc. made contributions to the Pension Plan for appellant's benefit; at no time did appellant or Crenshaw Inc. disclose to the Pension Plan appellant's 50 percent stock ownership.

On July 11, 1973, the Pension Plan notified appellant by letter he had acquired a vested pension benefit whereby he was entitled to receive the sum of $500 monthly at retirement. Upon discovery of appellant's ownership interest in Crenshaw Inc. and on September 25, 1973, the Pension Plan advised appellant he was ineligible for the pension benefit and thereafter, on November 25, 1973, tendered its refund of contributions made in his behalf in the amount of approximately $8400. The tender was not accepted and appellant on June 21, 1974, brought the within action for declaratory relief, breach of contract and deceit. Following special demurrers sustained and respondents' answers to appellant's first amended complaint, the matter was set for trial on October 18, 1976, at which time the trial court granted respondents' motion for judgment on the pleadings. A subsequent motion for reconsideration and for leave to file a second amended complaint

was considered by the trial court and on April 18, 1977, in the judgment appealed from was denied.[2]

In substance, the trial court found: (a) appellant's eligibility for benefits from the Pension Plan was determinable from the provisions of section 186(c)(5)[3] as interpreted by federal law; (b) under the Act, any payments by or on behalf of an employer to the Pension Plan for the benefit of such employer are illegal, violative of criminal sanctions contained in the Act and cannot provide a basis for any claim of estoppel which would require awarding a pension to such employer; (c) under the circumstances present

---

[2]The judgment contains in recital form the statement that "having granted Plaintiff leave to file a Second Amended Complaint, which does not materially differ from Plaintiff's First Amended Complaint, the Court finds as follows: * * *." No second amended complaint was filed except as a proposal made part of the motion to reconsider and it is sufficiently clear the judgment did not intend to provide permission for its filing, since the motion for judgment on the pleadings in fact was granted and the motion for reconsideration denied.

[3]Section 186 provides in pertinent part:

"§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(This footnote is continued on next page)

and in accordance with prior decisions of the National Labor Relations Board (the NLRB), recognized by the United States Supreme Court as definitive in any instance where made within the NLRB's authority, appellant was not an employee as required by the Act; and therefore, (d) no cause of action had been or could validly be asserted by appellant.

We concur in the trial court's reasoning and in the result reached. In our view, the matter turns upon the questions whether one is an employee so as to satisfy the Act's requirements and whether that determination is solely ascertained by reference to federal

(3) to any employee or group or committee of employees of such employers employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employee or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(c) The provisions of this section shall not be applicable

* * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer,* and their families and dependents

* * *

(d) *Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.* [Emphasis added]"

rather than state law.[4] The latter question is answered clearly in the affirmative. (See *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482; *Lehto v. Underground Constr. Co.* (1977) 69 Cal.App.3d 933.)

> "By its terms, section 301 of the Labor Relations Act permits suit for violation of a collective bargaining agreement to be brought in federal court. * * * However, in enacting section 301(a), Congress promulgated more than a mere jurisdictional statute; it authorized the federal courts to create a body of federal law for the enforcement of collective bargaining agreements within the ambit of congressional power. (*Textile Workers Union v. Lincoln Mills* (1957) 353 U.S. 448, 456-457 [1 L.Ed.2d 972, 980-981, 77 S.Ct. 912].) In accord with the holding of *Lincoln Mills,* the California Supreme Court has declared that when state courts exercise concurrent jurisdiction with federal courts, they must, in adjudicating an action which could have been brought in the federal courts under section 301, apply federal substantive law. (*Butchers' Union Local 229 v. Cudahy Packing Co.* (1967) 66 Cal.2d 925, 930-931 [59 Cal.Rptr. 713, 428 P.2d 849]; *O'Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 486 [30 Cal.Rptr. 452, 381 P.2d 188].)" (*Lehto, supra,* 942-43.)

[4]An additional question relating to jurisdiction of the trial court is raised by respondent Local 108. In brief terms, it concerns whether appellant could state a cause of action commenced under section 186(c)(5) in view of the contents of section 186(e) thereof (see *Mobile Mechanical Contractors Assn. v. Carleugh* (1977) 566 F.2d 1213) or under section 185, to enforce the terms of a collective bargaining agreement. While ordinarily such an issue would be viewed as a threshold matter, we do not so address it, since under the circumstances here involved, the question essentially would be disposed of upon the rationale we adopt in our opinion.

That being the case, it is likewise clear appellant in no wise was an employee for purposes of the Act and accordingly could not enjoy the benefits claimed. So far as section 186 is concerned, the definition of employee is that found in section 152(3), viz:

> "The term employee shall include any employee, and shall not be limited to employees of a particular employer, unless this sub-chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment, shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

While it is not true that the NLRB is immunized from judicial review in providing parameters within which definitions are to be correctly understood, it is the case that:

> "* * * the task of determining the contours of the term 'employee' 'has been assigned primarily to the agency created by Congress to administer the Act.' NLRB v. Hearst Publications, 322 US 111, 130, 88 L Ed 1170, 1184, 64 S Ct 851 (1944). See also Iron Workers v. Perko, 373 US 701, 706, 10 L Ed 2d 646, 649, 83 S Ct 1429 (1963); NLRB v Atkins & Co. 331 US 398, 91 L Ed 1563, 67 S Ct 1265 (1947)."

and that:

> "[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."
> (*Allied Chemical & Alkali Workers v. P.P.G. Co.* (1971) 404 U.S. 157, 166; see also *Associated Gen. Contractors, Etc. v. N.L.R.B.* (1977) 564 F.2d 271.)

In turn the NLRB has determined: "Where an individual owns 50 percent or more of a closely held corporation, as in the case of a co-partner, that individual is, for the purpose of Section 152(3), the actual employer of the employees." (*Cerni Motor Sales, Inc.* (1973) 201 NLRB 918. See also *Toyota Midtown, Inc.* (1977) 233 NLRB 106; *Foam Rubber City No. 2 of Florida* (1967) 167 NLRB 623.) Accordingly, appellant was not an employee within the scope of section 186 and was not properly a recipient of any pension benefit thereunder.

Nor is this result altered by considerations of estoppel since the constraints of section 186 are criminal in nature and "Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust. Rittenberry v. Lewis, 238 F.Supp. 506 (E.D.Tenn. 1965); Bolgar v. Lewis, 238 F.Supp. 595 (W.D.Pa. 1960)." (*Moglia v. Geoghegan* (1968) 403 F.2d 110, 116.)

Finally, as set out in the Agreement and Declaration of Trust Establishing Sheet Metal Workers' Pension Plan of Southern California, Arizona and Nevada, dated August 11, 1972, the powers of the Pension Plans' trustees includes the power "To construe the provisions of this Trust Agreement and the Pension Plan and any such construction adopted by the Board in good faith shall be binding upon any and all parties or persons affected thereby."

Here, the trustees determined appellant was not eligible for benefits based upon their acceptance of the definition of the term employee as outlined above. Under such circumstances, where there is no showing nor any sufficient allegations in the complaint that the trustees acted arbitrarily, capriciously or in bad faith, their actions are final and not subject to judicial review. (*French v. Construction Laborers Pension Trust* (1975) 44 Cal.App.3d 479; *Park v. Board of Trustees* (1971) 21 Cal.App.3d 630.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

ROTH, *P.J.*

We concur:

FLEMING, *J.*
COMPTON, *J.*

Modification of Opinion.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Harold Brauer, Plaintiff and Appellant, vs. Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada; Local 108 of Sheet Metal Workers International Association; C. Ringwood, Defendants and Respondents. 2d Civ. No. 52726, (Sup. Ct. No. C-92128).

Filed: July 11, 1978.

THE COURT:

It is hereby ordered that the opinion filed herein on June 27, 1978 be, and it is hereby modified and corrected as follows:

The last two lines on page 1 thereof are stricken and the following is substituted in lieu thereof:

"Robert W. Gilbert, A Law Corporation, By: James B. Goodman for Defendant and Respondent Sheet Metal Workers Pension Plan of Southern California, Arizona and Nevada;

"Pesses, Golden and Chapman, By: William S. H. Chapman for Defendant and Respondent Local 108 of Sheet Metal Workers International Association and Clyde Ringwood."

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of November, A.D. 1978.

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